Attachment 1

Response To Assertions That The Department of Energy Lacks Legal Authority For Recognition Of Transferable Credits And Baseline Protection

After the Electric Power Industry Climate Initiative (EPICI) submitted on September 25, 2002, supplemental legal authority comments to the Department of Energy (DOE) docket established on May 6, 2002 *(*see 67 *Fed. Reg.* 30370), another commenter, Marlo Lewis, submitted a lengthy paper that examines the EPICI comments. That paper does not apparently take issue with our contention that these two concepts, baseline protection and transferable credits, are separate and distinct, but concludes that they "ultimately have no application except as part of a regulatory (emissions cap-and-trade) program" and that to "set up a pre-regulatory crediting program via 'guidelines,' pursuant to no statutory authority, would not only be improper," it "would also be illegal."

We disagree with the premise that these concepts "have no application" unless they are part of a regulatory cap and trade program and assume that the Administration also agrees fully with us, particularly in light of the President's directives of February 2002 regarding both concepts. Those directives surely did not reference a cap and trade program, and we presume that none is contemplated.

We also disagree with the paper's contention that guidelines could not give recognition to these two distinct concepts and that DOE is legally incapable, in revising the Energy Policy Act (EPAct) section 1605(b) guidelines and improving the existing database/registry, to provide such recognition of these two concepts.

First, as to the question of whether "guidelines" could give "recognition" to these two distinct concepts, we simply note that section 1605(b) provides that the Secretary "shall . . .issue guidelines for the voluntary collection and reporting of information on sources of greenhouse gases" and that the EIA "shall develop forms for voluntary reporting under the guidelines" and "establish a data base comprised" of the voluntarily reported information. While the section is silent on public access and disclosure of the collected or reported information, DOE and the Energy Information Administration (EIA) have interpreted these provisions to provide for public disclosure of the information, subject to EPAct subsection 1605(b)(3) on confidentiality. Indeed, EIA publishes the information annually (see EIA report Voluntary Reporting of Greenhouse Gases 2000 (Feb. 2002)). To our knowledge, there is nothing in EPAct subsections 1605(a) or (b), the current guidelines or any other relevant law applicable to DOE and EIA that would preclude EIA from including "recognition" of these concepts as part of that annual publication.

Second, as to the question of legal authority for DOE to revise the current guidelines to provide such recognition, we refer to our letter and enclosure of September 25, 2002, which discuss this issue of legal authority at length and conclude that there is ample authority to recognize and

apply these two concepts. Our conclusions are based on the legislative history of section 1605, particularly the work of the House-Senate Conference Committee; subsection 1605(b)(4), which states that the information voluntarily reported "may be used by the reporting entity to demonstrate achieved reductions" of greenhouse gases; and the general authority contained in the DOE Organization Act. Referenced also was the Framework Convention on Climate Change (FCCC), which the U.S. signed and ratified in 1992 prior to the enactment of EPAct. Clearly, the FCCC and section 1605 are in accord in encouraging voluntary actions to reduce and report reductions, avoidance and sequestration.

Contrary to the views expressed in the Lewis paper, EPICI did not rely on remarks made on final passage of EPAct by Democratic Sen. Lieberman for these legal authority conclusions. EPICI did take note of those remarks because they were relevant to the changes made in the Conference Committee to the House and Senate versions of section 1605 that afforded greater "discretion" in the implementation of the new subsection (b) of section 1605. As we noted in footnote 5 of our enclosure to our September 25, 2002, supplemental comments, a Republican conferee who was a signatory of the Conference Committee's reported bill, Rep. Carlos Moorhead, made similar remarks on final House passage of the bill when he said the conference report survived "with less detail and more discretion for the Administration." 138 *Cong. Rec*. H11438 (daily ed. Oct. 5, 1992). Both remarks are supportive of the EPICI view that the final bill that was enacted clearly was revised from the pre-conference versions by 1) shifting from a call for rulemaking to guidelines and 2) discarding 11 specific provisions, including provisions on crediting and double counting, in favor of far more general language. In our view, the Lieberman/Moorhead descriptions of the final version that it was "streamlined" and entailed "less detail and more discretion" are accurate and quite appropriate. They are sound and valuable legislative history in support of the EPICI conclusion that the revised section 1605 provides "more discretion in the program's administration."

We also note rather extensive comments in the Lewis paper about bills introduced, but never enacted, during the 105th and 106th Congresses by Sen. Lieberman and others regarding "early credit" proposals. The paper asks why the Senator championed such legislation in those Congresses, if the authority already existed for these two concepts in EPAct. Not knowing the intent of the Senator, we would not presume to reply to this rhetorical question. However, we understand that the bills (S. 2617 and S. 547) were decidedly regulatory in nature, which is exactly the opposite result achieved by the Conference Committee in adopting a revised section 1605. In fact, S. 2617 was an amendment to the Clean Air Act and depended on the issuance by the President of numerous regulations. S. 547, while not an amendment to that Act, also required the promulgation of regulations. Moreover, EPAct was enacted in the 102d Congress. References to introduced bills in later Congresses can have no bearing on the meaning and legislative history of a prior enactment.